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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RICHARD CRAIG TORRES, Defendant and Appellant.	C086960 (Super. Ct. No. 07F10409)

A jury found defendant Richard Craig Torres guilty as charged of one count of lewd or lascivious conduct with a child under age 14 (count one), 18 counts of forcible lewd and lascivious conduct with a child under age 14 (counts two through nineteen), and one count of forcible rape (count 20) (Pen. Code, §§ 288 subds. (a) & (b)(1), 261, subd.

(a)(2)).[1] The trial court sentenced defendant to 160 years in prison; defendant timely filed this appeal.

On appeal, defendant contends (1) the trial court should have excluded evidence of domestic violence, (2) the court misinstructed on that evidence, and (3) the court erred in imposing full term consecutive sentences on all counts. For reasons we explain, we agree with the last point and remand for resentencing.

BACKGROUND

The alleged victim was Brittney Doe, daughter of defendant's then-girlfriend Katrina. The offenses were alleged to have occurred between June 1, 2005, and December 1, 2006. Brittney testified that defendant repeatedly molested her when she was 13 and 14 years old. There was evidence defendant had been violent towards Brittney's mother Katrina, her half-brothers D. and A., and defendant's wife Julia. Brittney testified that because she knew about this violence she feared defendant would hurt her if she did not submit to his sexual demands. Defendant fled to Mexico after a detective asked him to surrender on a warrant and remained in Mexico for seven years while using a false name. He was eventually arrested in Mexico and extradited to the United States. He denied the charged offenses.

People's Case

Brittney Doe testified defendant had been a father figure to her and had met her mother Katrina while Katrina was pregnant with Brittney. Brittney was born in July 1992 and her half-brothers D. and A. (sons of defendant and Katrina) were born in June 1994 and June 1996, respectively. She had two other half-siblings, C. and N., the son and daughter respectively of Katrina and another man. After Katrina left defendant, he married Julia, and they had M., a son. Brittney lived with defendant from birth to about

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[1] Further undesignated statutory references are to the Penal Code.

age four. After her mother left defendant, Brittney lived with an aunt and did not communicate with D., A., or defendant. This was from about the time she was four until she was about 11 or 12. She lived with defendant for a couple of months when she was in the fifth grade, then lived with her mother, and then lived with defendant again when she was 12; she would have started eighth grade shortly after her 13th birthday (in July 2005).

When Brittney lived with defendant in the fifth grade she met Julia (pregnant with her son M.); her half-brothers D. and A. were also in that household. Before Brittney turned 14 (in July 2006) she left school in Sacramento a couple of months early and moved to the San Diego area (Oceanside) to live with Katrina.

The first time defendant did anything sexual to Brittney was one to three months after a pool party to celebrate her 13th birthday in the summer of 2005. The family had stayed in two rooms in a hotel in Southern California, one for Julia and M. and one for defendant, D. and A., and Brittney. While her half-brothers slept in one bed, Brittney slept in defendant's bed. She woke up to find defendant fingering her vagina under her underwear; when she told him to stop, he claimed he had thought she was his wife Julia, seemed to cry, and was apologetic (count one). He had suggested the sleeping arrangements and she had never slept with him before. She then slept with her half-brothers, and the next morning defendant said nothing; at that time Brittney believed his claim of mistake.

After that incident (summer or fall of 2005) defendant began touching her, groping her and performing oral sex on her. The sexual abuse began about a month after the hotel incident, and within another month it reached the level of intercourse. Between then and when she moved in with her mother in May or June of 2006, no week went by without defendant performing sexual acts on her. At most she had three or four days of respite; it was "almost a daily occurrence." She testified defendant had intercourse with her at least 100 times.

Typically when defendant would orally copulate Brittney, he would insert a finger into her vagina and sometimes also into her anus; this happened fairly frequently. He orally copulated her to lubricate her before intercourse. She remembered the first time they had intercourse, which occurred in her room at night. The abuse first occurred mostly at night, but then segued to the daytime when she got home from school before her brothers. Sometimes it happened in his room, and once or twice it happened in the loft.

Once in her room (in about the middle of abusive period) she resisted and kicked defendant across his face; he became angry and shoved her off the bed so violently she fell onto the floor (count two). A few days later the abuse continued, and she never again resisted because she was afraid he would hit her the way he hit her brothers. Brittney explained that she was afraid because of the way defendant abused D. and A.; she had seen him hit them. Once (after he had begun abusing her) she saw him kicking A. with boots while A. was curled up on the ground. She had previously seen him slapping or punching A.; defendant told her he could not believe the older children would not defend their brother and just watch; this had terrified her. She also recalled him pinching the children, calling them names and so forth, mostly after the sexual abuse began. He would also verbally abuse Julia and once (before the sexual abuse began) Brittney saw that Julia had a black eye. Brittney's mother (Katrina) had also told her defendant had been violent with her.

After Brittney and A. moved to live with Katrina in military base housing near Oceanside (around April or May of 2006), defendant and D. came for a visit. A. and Brittney were supposed to go with him to visit his parents. They stayed in the same hotel where the abuse had begun. Brittney had her own room, but defendant came in and had intercourse with her one last time; she was 14 years old on that occasion, and this happened no later than December 2006 (count twenty).

Once in the loft (after the time she resisted him) he had her get in his lap, facing him, for sex (count nineteen).

Defendant used a condom once or twice; the first time (in his bedroom) the sex was painful (apparently count thirteen). Once he tried to sodomize Brittney in his room (count twelve). Each of the times he had intercourse with her in *his* bedroom occurred after the time she resisted him; this happened four or five times. Once while they were having intercourse in defendant's bedroom, her brothers came home early and defendant rushed her out and told her to dress and go to her room (apparently count fourteen).

Brittney had a school friend named Kristina during this time, but did not tell her what was happening because she was ashamed. She finally told Kristina (via computer) and another school friend (B.W.) after she had moved away and was living with her mother. Brittney became depressed after the molestations and until she turned 17 would cut herself with scissors and razors.

At some point, Brittney told Katrina and Katrina told the police. Via an overheard telephone call, Brittney knew defendant pressured her to drop the case through her brother D.

Of the four or five instances of intercourse in defendant's room after the time she resisted him, Brittney remembered three specific occasions: Once he wore a condom; another time he tried to sodomize her; and a third time her brothers came home (counts twelve, thirteen, & fourteen). After the time Brittney resisted him, he had intercourse with her in her room more than five times (counts fifteen & seventeen), put his mouth or hands on her breasts more than five times (counts sixteen & eighteen), orally copulated her more than five times (counts four, seven, & ten), fingered her vagina more than five times (counts three, six, & nine), and fingered her anus more than five times (counts five, eight, & eleven).

Katrina testified she was 17 and pregnant with Brittney when she met and began dating defendant in 1992; they stayed together for about four years and she had her sons D. and A. with him. Within a few months he became violent and Katrina eventually left him for that reason. In addition to verbal abuse, he would hit her with a closed fist and choke her. The first time, he grabbed her ankle while she was on some stairs, causing her to fall and birth Brittney prematurely. After that, throughout their relationship she was constantly subject to hitting, punching, or choking and sometimes this happened in front of Brittney. During an argument while Katrina held D., they ended up "playing tug of war with the kid;" she went to a women's shelter and defendant was arrested. When Katrina told defendant she was pregnant with a son (D.), he choked her and said he did not want a son. When she was pregnant with A., he knocked her down and she twisted an ankle and had to go to the hospital. At some point Katrina told Brittney about defendant's physical abuse.

Katrina testified that she spoke with defendant a couple of times while he was in Mexico; D. would be talking to his father (via Skype) and ask his mother to talk to him. At defendant's request, and out of concern for Brittney's fragile condition, Katrina spoke to Brittney about recanting so that defendant could return to the United States "and everybody just could get on with their lives," but when Brittney refused to drop it, Katrina supported Brittney's decision.

Kristina testified she was best friends with Brittney in middle school. Defendant was angry and aggressive with Brittney (by tone of voice and physically pushing her around). Once he backed Kristina into a corner and confronted her about a note she wrote to Brittney.

In the summer of 2006, after Brittney had moved to Oceanside, Brittney communicated to Kristina that defendant had sexually abused her. Brittney told Kristina specifics that were consistent with her testimony at trial and was upset and crying.

When refreshed with a police report from her 2007 conversation with a detective, Kristina testified she told the truth to the detective, but did not presently remember seeing defendant punch Brittney's brothers (A. and D.) and telling them they needed to toughen themselves up for hockey, as reflected by the detective's report.

B.W. had been another of Brittney's friends in middle school. Within months after she had moved away ("in 2007ish"), Brittney told B.W. via MySpace that her father had molested her multiple times and she did not want to be around him. B.W. did not tell anyone at first because Brittney wanted to keep it a secret, but he later spoke to a detective at his high school and told the detective the truth about what Brittney had told him.

A psychologist explained Child Sexual Abuse Accommodation Syndrome (CSAAS), consistent with similar CSAAS testimony in other cases. He described five components of the syndrome: (1) secrecy, where an abuser may threaten the child (including indirectly by getting angry at or committing violence against others) or bribe the child with attention or gifts to discourage reporting, or a child may simply be too ashamed or afraid of being disbelieved to report abuse; (2) helplessness, where a child feels reporting will not change the situation, such as trying but failing to resist the perpetrator, or where the perpetrator is bigger and stronger; (3) entrapment or accommodation, where a child will adopt coping mechanisms, such as pretending to sleep through the abuse, walking home a longer way to avoid the perpetrator, or cutting to control emotional pain; (4) delayed and incremental disclosures of abuse, and (5) suggestibility, where a very young child (such as a preschooler) may be led to believe something that did not happen. The subject of prolonged abuse may not remember every incident, particularly if the abuse becomes regular or typical.

A detective (Givens) assigned to Brittney's case spoke with Kristina and B.W. in September 2007. Kristina told him defendant was violent with his sons A. and D., and she had seen him punch them. B.W. told him Brittney had told him (via MySpace) that

defendant had molested her. After Givens obtained a warrant for defendant's arrest on November 5, 2007, he called and asked defendant to turn himself in two days later. Although defendant asked for more time, Givens insisted he keep the appointment. Defendant's former attorney then assured Givens defendant would surrender himself as directed. But defendant never showed up. Givens investigated defendant's whereabouts and defendant was identified in 2014 in Mexico, where he was working in construction. Defendant soon was arrested in Mexico and then was extradited back to California in August 2015.

A physician specializing in child sexual abuse described the findings from three examinations Brittney underwent in May and September 2007. One concluded Brittney had scarring and cuts on her hymen consistent with penetrating genital trauma. The others were normal, but physical injuries from pediatric sexual abuse generally heal relatively quickly.

Defense Case

Defendant admitted he had been physical with Katrina and blamed it on PTSD from his service in the Persian Gulf War. While in jail he received psychiatric treatment and medication for the first time. He had fought with his wife Julia. He admitted he was loud, aggressive, and strict. He denied beating or kicking A., admitted swatting or spanking his kids, but denied spanking Brittney. He denied molesting Brittney. He fled because he could not afford bail, and because when he was in custody years before on a DUI charge he saw how badly an accused child molester was treated; he thought he would be killed so he went to Mexico. He admitted his convictions for spousal abuse and child abuse based on an incident with Julia and D., but denied the convictions reflected what had really happened.

Julia testified defendant was physically and verbally abusive. More than once he hit her or pulled her hair, once he gave her a black eye, and another time he kicked her with hard-toed shoes or boots. During their relationship defendant used "regular punishment" with the children (time-outs and spanking), but "nothing abnormal."

Closing Arguments

The prosecution argued that as to the first forcible count, count two, Brittney resisted defendant (including kicking him across the face) but he shoved her off the bed causing her to hit the floor, showing he was willing to use and did use force. That message, combined with Brittney's home environment where violence was rife induced her to comply with further sexual acts, showing that those further acts were accomplished by fear and duress. She did not exaggerate her claims and had no motive to lie. She also told two of her middle school friends after she moved away. Defendant had been violent with Katrina, and with Julia. The psychologist, who had not known about the facts of this case, explained why child sex abuse victims may not report immediately, and some of the details he gave dovetailed with Brittney's testimony. Defendant had a child abuse conviction involving D., his son. The uncharged act evidence was to be used only to show Brittney's state of mind, that she was terrified of defendant. Defendant lied about why he fled to Mexico; he had been afraid to face the consequences of his actions.

The defense argued Brittney, who had had a difficult childhood without a stable home, wanted attention and wanted to be able to live with her mother. Defendant had anger issues stemming from his PTSD, but he had not lied about spousal abuse and the evidence showed he was a good provider for his family. He fled because he knew from prior jail experience what happens to accused child molesters. Brittney was making up (or at least exaggerating) whatever family physical abuse she had been aware of, because Katrina did not tell Brittney about defendant abusing her until after Brittney made her allegations, and Julia testified defendant did not physically abuse her in front of the

children. Brittney's claim of 100 incidents was inconsistent with the relatively short time frame of the alleged sexual abuse she described.

DISCUSSION

I

Domestic Violence Evidence

Defendant contends the evidence of his physical abuse of family members was hearsay and amounted to improper and inflammatory propensity evidence. He separately contends that to the extent appropriate objections were not made, trial counsel did not provide constitutionally effective assistance of counsel.

We agree with the trial court that the domestic violence evidence was admissible for the non-hearsay purpose of showing Brittney's fear of defendant, a fact relevant to most of the charges. The jury was instructed on the proper use of this evidence, a limitation that the prosecutor emphasized in closing argument. Defendant's claims fail.

A. *Background*

The prosecution moved in limine in part to introduce evidence of defendant's acts of violence against various family members (his wife Julia, his two sons, and Katrina), to show that Brittney was fearful he would become violent with her if she refused his advances, that is, to show her state of mind. The motion alleged that "Brittney either personally witnessed or had personal knowledge of Defendant's past violence that the People seek to introduce."

After an unreported chambers conference, defense counsel agreed he had not opposed the introduction of this evidence generally, but instead had interposed limited foundational and hearsay objections, which the court clarified to mean "It has to be within [Brittney's] knowledge" and not be hearsay, without prejudice to reconsideration if no adequate foundation were provided. The prosecutor and the court then clarified that some of the evidence (e.g., Katrina telling Brittney about defendant abusing Katrina), would not be hearsay because the statement was not being introduced for its truth, but to

show Brittney's knowledge and state of mind; defense counsel raised no objection to this plan.

Later during that same pretrial discussion, the prosecutor explained that she wanted to introduce evidence of defendant's domestic abuse convictions (assault on a child under eight (on his son D.) and spousal abuse (of his wife Julia) to impeach defendant if he testified, (2) to show that Brittney was telling the truth about his violence and her fear of him, and (3) to impeach the expected testimony of one of defendant's sons (D.), who was expected to testify that defendant was not violent. The trial court deferred a ruling pending the state of the evidence as it developed during trial.

The only further objection to domestic violence evidence was during Brittney's testimony. When Brittney was asked if she had seen defendant be violent towards Julia, she answered that he would verbally berate Julia and once she saw Julia had a black eye. When Brittney asked Julia about it, Julia "said that a blood vessel had popped and that I needed to mind my own business. But I didn't really believe her, because my mom had mentioned - -" at which point defense counsel interposed a hearsay objection. The trial court overruled that objection, and admonished the jury not to use the statement "for the truth of what her mother told her, but only as evidence as to what formed the basis for her belief." Brittney then testified that Katrina had told her defendant had been violent during their relationship.

During the instructional conference, defense counsel unsuccessfully objected to CALCRIM No. 375, an instruction we discuss more fully in Part II of the Discussion, *post*. That instruction in part told the jury the challenged evidence was admissible only to show Brittney's state of mind during sexual abuse and that the jury could "not conclude from this evidence the defendant has a bad character or is disposed to commit crime."

During closing argument, the prosecutor addressed the domestic violence evidence as follows:

> "Now I want to make perfectly clear at this point what that evidence is used for, because we did hear about his past acts of violence. The violence was only admitted for a limited purpose. It is to go to Brittney's state of mind when she is telling you in court, 'I was terrified of that man for all of these reasons.' That's why you got to hear about how violent the defendant was. You needed to understand what was going on in Brittney's mind when she was being abused by him . . . .
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> "It would be wrong for you to convict him of these charges because he hit his wives. You cannot do that. But you do get to use the evidence to look at what was going on in Brittney's mind and to see if her fear of him was really reasonable and if her testimony was credible. And by hearing about all of his violence, it absolutely was. You must use that evidence in the right way when deciding this case."

B. *Analysis*

On appeal defendant contends that the domestic violence evidence was inadmissible hearsay evidence, designed to show and tended to show that defendant was a violent man. As we have explained, the record contradicts this contention.

Generally, the admission of other crimes evidence is governed by Evidence Code section 1101. "Subdivision (a) of section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Subdivision (b) of Evidence Code section 1101 provides in part: "Nothing in this section prohibits the admission of evidence that a person committed a crime . . . or other act when relevant to prove some fact (*such as* motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." (Italics added.)

As indicated by our emphasis on "*such as*," the list of permissible uses for uncharged conduct evidence provided by this statute is not exclusive. (See *People v. Key* (1984) 153 Cal.App.3d 888, 894.) Here, evidence of domestic violence either witnessed by or believed to have occurred by Brittney was relevant to show her fear of defendant. This point was highly relevant, and this evidence was highly probative on this point.

All but one of the charged offenses required proof the alleged acts were accomplished by use of force, fear, or duress. (See §§ 261, subd. (a)(2) [count twenty; rape committed by "force, violence, duress, menace, or fear of . . . bodily injury"], 288, subd. (b)(1) [counts two through nineteen; lewd or lascivious act on child under 14 committed by "force, violence, duress, menace, or fear of . . . bodily injury"].) Proof of "duress" as used in these statutes requires direct or implied threats that would coerce a reasonable person to submit to acts that otherwise would be resisted. (See *People v. Leal* (2004) 33 Cal.4th 999, 1004-1005.)[2] Defendant's not guilty plea directly placed in issue the element of force applicable to most of the charged offenses. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1243.)

Evidence that Brittney submitted to defendant's sexual conduct out of fear that he would harm her was directly relevant to prove the element of fear or duress. Evidence that she knew he was capable of violence against family members had a clear "tendency in reason" (Evid. Code, § 210) to bolster her claim of fear. Evidence of a person's fear of

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[2] We have interpreted "duress as used in the context of section 288 to mean a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted." (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 50, fn. omitted, quoted with approval in *People v. Leal*, *supra*, 33 Cal.4th at p. 1004; but *Pitmon* was disapproved on a different point by *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12.) We have further explained that "The total circumstances, including the age of the victim, and [their] relationship to defendant are factors to be considered in appraising the existence of duress." (*Pitmon,* at p. 51.)

another is relevant where it pertains to an element of a charged offense. In this case the issue is the admissibility of statements of others to Brittney about defendant's violence, thereby allegedly inducing or exacerbating her fear of him. As relevant to this point, our Supreme Court has held generally that "In a prosecution for forcible rape, evidence is relevant if it establishes *any* circumstance making the victim's consent to sexual intercourse less plausible." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1123-1124, italics added.) Another appellate court has held sufficient evidence of duress was shown based on testimony that the victim submitted at least in part because of threats of harm directed at her mother. (See *People v. Garcia* (2016) 247 Cal.App.4th 1013, 1024.)

This was the way the evidence of defendant's domestic violence was used in this case, not for propensity purposes. Brittney's reasonable belief based on what she had been told about defendant's acts of violence toward close family members bolstered her percipient knowledge of such violence and reasonably tended to show she did not consent to sex willingly, but out of fear that he would wield his physical violence against her.

The fact that Brittney did not personally witness all of the violence she described went to the weight, not the admissibility of the evidence. It is not necessary to show that a victim personally witnessed violence to show that it made an impression. (Cf. *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519-521 [if an employee does not witness but nevertheless knows about hostile workplace conduct towards other employees, that knowledge could bolster her perception of a hostile work environment].)

Defendant points out that Brittney testified she was afraid of defendant (in part) because she saw him hurt A., but did not directly link her fear to defendant to whatever Katrina had told her about violence. This point, too, goes to the weight of the evidence. Although the prosecutor could have been clearer about asking Brittney whether her fear of defendant was exacerbated by each piece of violence she either witnessed or reasonably believed based on what she was told, the clear import of her testimony was

that her fear of defendant was well founded because his verbal abuse and violence permeated the extended family structure.

Nor was the evidence of what Brittney learned from Katrina unfairly "pervasive" as defendant suggests. The prosecutor was entitled (subject to the weighing process of Evid. Code, § 352, upon timely objection) to introduce available probative evidence on the issue.[3] We agree that at some point repetitious evidence on an issue may become prejudicial (see *People v. Williams* (2009) 170 Cal.App.4th 587, 611), but that point was not reached here. The trial was relatively short, and the uncharged act evidence was probative on an important issue (duress or inducement of fear); further, and contrary to defendant's view, it did not predominate at trial. The evidence of defendant's sexual abuse of Brittney, flight, and use of a false name predominated.

The jury was instructed about how to use--*and how not to use*--the evidence. (See Part II, *post*.) And the prosecutor correctly explained the limited use of the evidence in closing argument. Absent something in a particular record showing to the contrary (which is not the case here), we must presume a jury understands and obeys any given instruction and correlates it with all other instructions. (See *People v. Vang* (2009) 171 Cal.App.4th 1120, 1129.)

Defendant is partly correct that the jury was told it would have to determine (by a preponderance of the evidence) whether defendant did commit the uncharged offenses. A more precise instruction could have told the jury it had to find Brittney honestly believed some or all of the accounts of defendant's uncharged acts of violence that she did not personally witness. But the instruction limited the jury's use of the evidence to show Brittney's state of mind, and defendant does not clearly explain how the instruction transformed the evidence into inadmissible hearsay.

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[3] No Evidence Code section 352 objections were interposed at trial.

For all of the above reasons, we reject defendant's contentions that the evidence of defendant's violence toward Brittney's family members should have been excluded. This obviates any need to address the Attorney General's contention of forfeiture or defendant's contention of ineffective assistance of trial counsel.[4]

II

CALCRIM No. 375

Defendant faults the instruction given about the domestic violence evidence, and separately faults trial counsel for not lodging further or clearer objections thereto.

"In reviewing claims of instructional error, we look to whether the defendant has shown a reasonable likelihood that the jury, considering the instruction complained of in the context of the instructions as a whole and not in isolation, understood that instruction in a manner that violated his constitutional rights. [Citations.] We interpret the instructions so as to support the judgment if they are reasonably susceptible to such interpretation, and we presume jurors can understand and correlate all instructions given." (*People v. Vang*, *supra*, 171 Cal.App.4th at p. 1129.)

CALCRIM No. 375 is the pattern instruction recommended for use when evidence has been introduced under Evidence Code section 1101, subdivision (b). That instruction has alternatives for a court to use depending on the nature of the trial evidence, such as evidence showing identity, intent, knowledge, and so forth. (See CALCRIM No. 375.)

Defense counsel objected to CALCRIM No. 375 because none of its alternatives "have to do with this specific incident or allegations of the spousal abuse. They go specifically almost to [Evidence Code sections] 1101, 1108, 1109-type evidence." The trial court overruled the objection because the evidence supporting the instruction went to

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[4] Defendant also discusses Evidence Code section 1109 and mentions Evidence Code section 1108, but because the evidence was not introduced under either of those statutes we need not discuss them in this appeal.

Brittney's state of mind, and Evidence Code section 1101 did not provide an exclusive list of the kinds of evidence to which it pertained. The court later instructed as follows:

> "The People presented evidence the defendant committed other offenses that were not charged in this case. You may consider this evidence only if the People have proved by a preponderance of the evidence the defendant, in fact, committed the offenses. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not the fact is true.
>
> "If the People have not met this burden, you must disregard this evidence entirely.
>
> "*If you decide the defendant committed the offenses, you may, but are not required to, consider that evidence for the limited purpose of evaluating Brittney's state of mind during the time of her sexual abuse. Do not consider this evidence for any other purpose except for the limited purpose of evaluating Brittney's state of mind during her sexual abuse.* Do not conclude from this evidence the defendant has a bad character or is disposed to commit crime.
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> "If you conclude the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of the charged offenses. The People must still prove each charge beyond a reasonable doubt." (Italics added.)

The portion of the instruction we have italicized reflects the trial court's modification to the pattern version of CALCRIM No. 375.

Defendant in part faults the instruction for not defining "other offenses," and contends that left the jury to speculate. He relies on our Supreme Court's discussion of the need to identify the evidence to which the instruction relates where impeachment evidence and other crimes evidence are both admitted at trial. (See *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 190.) But in this case, the reference to defendant's prior convictions was primarily used as proof of Brittney's knowledge of his physically abusive behavior towards family members, and only secondarily as crimes impeaching his testimony. In other words, they overlapped both ideas, impeachment (generally) and

domestic violence. More importantly, the instruction on other crimes evidence as given (CALCRIM No. 375, quoted *ante*) tethered *all* of the uncharged act evidence to the issue of Brittney's state of mind. We disagree that the jury was improperly left to speculate about what other offenses were relevant to this instruction.

To the extent defendant contends the instruction lowered the People's burden of proof or signaled that the trial court believed the prosecution's case, we disagree. Defendant cites *People v. Owens* (1994) 27 Cal.App.4th 1155 to support his contention that this instruction "impermissibly slanted the determination of guilt or innocence . . . toward the prosecution" by signaling "that in fact sexual abuse had occurred." The problem with the instruction in *Owens* was a phrase describing certain prosecution evidence as "tending to prove" a fact; *Owens* interpreted this language to suggest the trial court believed that evidence, and concluded that "[i]nstructing the jury that the People have introduced evidence 'tending to prove' appellant's guilt carries the inference that the People have, in fact, established guilt." (*Id*. at p. 1158.) As we have set forth above, the modified version of CALCRIM No. 375 given in this case referenced Brittney's state of mind "during the time of her sexual abuse" and "during her sexual abuse." Defendant contends these phrases pose the same problem as the phrasing disapproved in *Owens*. We think a rational jury would interpret the instruction to mean "alleged" sexual abuse, although it would have been better to include that caveat in the instruction.

But even if we found error it would be harmless. *Owens* found the troublesome language in that case to be harmless in light of the instructions as a whole, because the jury in *Owens* also had been instructed on the presumption of innocence, the People's burden of proof beyond a reasonable doubt, the ability to convict Owens of certain lesser offenses, and that the instructions should not be construed as expressing the trial court's opinion on any of the facts. (*People v. Owens, supra*, 27 Cal.App.4th at p. 1159.)

Similarly, by its terms the modified version of CALCRIM No. 375 given in this case reminded the jury of the People's burden to prove each of the charged offenses beyond a reasonable doubt, and that even if the jury found that defendant committed uncharged acts, that was "not sufficient by itself" to show his guilt of the charged offenses. And this jury was separately instructed (CALCRIM No. 220) on the presumption of innocence and on the People's burden of proof beyond a reasonable doubt. Further, this jury was also instructed (CALCRIM No. 200) that it "alone" had the duty "to decide what happened," and that some of the instructions "may not apply, depending on your findings about the facts" and not to assume that just because "I [i.e., the trial judge] give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." Finally, this jury, like the jury in Owens, was instructed on lesser offenses. (CALCRIM No. 3517.) Therefore, construing the instructions as a whole (as we must), just as in *Owens* there is no reasonable probability that the jury would have assumed either that the trial court was directing the jury to find sexual abuse had occurred or that the court believed that sexual abuse had occurred, as defendant posits.

Moreover, in Part I, *ante*, we quoted the prosecutor's discussion of this evidence during closing argument. The prosecutor accurately explained why the evidence had been introduced and what the jury could and could not use it for. Although the arguments of counsel are not a substitute for accurate and complete instructions, our Supreme Court has held that in determining "whether the interplay of argument with individually proper instructions produced a distorted meaning, it seems appropriate to evaluate the remarks of both counsel to determine whether the jury received adequate information." (*People v. Brown* (1988) 45 Cal.3d 1247, 1256; see *People v. Garceau* (1993) 6 Cal.4th 140, 189 ["any theoretical possibility of confusion was diminished by the parties' closing arguments"].) The prosecutor's argument eliminated any realistic

chance that the jury would have misunderstood the point of the challenged evidence as explained by CALCRIM No. 375 as given in this case.

Accordingly, we reject defendant's claim of instructional error.

III

Mandatory Full-Term Consecutive Sentencing on Certain Counts

Defendant contends the trial court did not have a basis grounded in the evidence for imposing mandatory full-term consecutive sentences *as to certain counts* not shown to have occurred on "separate" occasions as provided by statute. As defendant points out in the reply brief, the Attorney General does not grapple with the claims made by defendant on appeal, but instead explains how *other* counts (the sentences for which defendant does *not* challenge) were based on acts committed on separate occasions. We agree with defendant that a remand for a new sentencing hearing is required to address the issue of consecutive sentencing.[5]

When a defendant is convicted of multiple felony counts and a trial court determines that consecutive (rather than concurrent) sentences are appropriate, the resulting sentence generally consists of a principal base term on one count plus subordinate terms on the other counts, and normally the terms for the subordinate counts are limited to one-third the midterm for those counts. (See § 1170.1, subd. (a).) However, as to certain sex crimes--including the crimes at issue on appeal--a trial court *may* impose full-term consecutive sentences within its discretion "if the crimes involve

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[5] A trial court must state reasons for imposing consecutive sentences. (See *People v. Neal* (1993) 19 Cal.App.4th 1114, 1117.) Because trial counsel did not object to the lack of any such reasons, he did not preserve that error. (See *People v. Boyce* (2014) 59 Cal.4th 672, 730-731.) But the Attorney General does not contend that this precludes him from arguing that the trial evidence did not support the implied finding that some of the counts were committed on separate occasions. (See *People v. Garza* (2003) 107 Cal.App.4th 1081, 1091 [if defendant is correct that some counts did not occur on separate occasions "the sentence was unauthorized in this respect"].)

the same victim on the same occasion" (*id*., § 667.6, subd. (c)), and *must* impose full-term consecutive sentences where the crimes involve "the same victim on separate occasions" (*id*., § 667.6, subd. (d)). This latter subdivision provides in relevant part:

> "A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions.
>
> "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (*Ibid.*)

Defendant raises no quarrel with full-term sentencing on counts one, two, twelve, thirteen, fourteen, nineteen, and twenty. Instead, defendant contends there is no evidence the other counts (counts three through eleven and fifteen through eighteen, all occurring in Brittney's room) occurred on "separate occasions" as provided in this statute. We agree in part.[6]

The way the amended information reads (coupled with the trial evidence), the nine charges reflected by counts three through eleven rationally can be grouped into three incidents in which defendant committed three different crimes. Counts three, four, and five, charged defendant respectively with vaginal fingering, licking the vagina, and anal fingering (all in Brittney's room). Counts six, seven, and eight, also charged defendant with those same three acts (respectively, and also in Brittney's room), with the provisos that these were "time other than" the offenses stated in counts three, four, and five.

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6 Defendant does not contend multiple *convictions* would have been improper if the jury had found he touched Brittney in multiple lewd ways at the same moment, and does not contend section 654 requires staying the execution of any of his sentences.

Similarly, counts nine, ten, and eleven, also charged defendant with those same three acts (respectively, and also in Brittney's room), again with the provisos that these were "time other than" the offenses stated in counts three through eight. Counts fifteen and sixteen alleged intercourse and licking breasts in Brittney's room. Similarly, counts seventeen and eighteen alleged these same two acts in Brittney's room, but with the provisos that these acts were "time other than" counts fifteen and sixteen.

In support of these charges Brittney testified that more than five times defendant forced "sex"--inferentially intercourse--in her bedroom *after* the time she resisted him. Defendant would mouth her breast area, and while this conduct also happened more than five times, it did not happen *every* time. He would also put his mouth on her vagina, and he did this more than five times. The same was true regarding fingering her privates in front and back.

After Brittney could not accurately state the number of times defendant molested her, she testified it was "almost a daily occurrence" and she remembered intercourse happening all the time. When asked what else defendant did to her during intercourse, she testified he usually used his hands or mouth on her breasts. A key part of her testimony is as follows:

> "Q. And is this something, kind of like the other acts you described, that those sort of happened together; the penetration of your vagina with his fingers, and penetrating your butt with his fingers, it was combined with oral copulation? So you kind of described those as a group. Is it fair to say, that he did that commonly together?
>
> "A. Yes."

Earlier she had testified that while defendant orally copulated her he typically would put his finger in her vagina, and less frequently he would also put a finger in her anus. "Q. You also have kind of explained this in combination with oral copulation; is that right? [¶] A. Yes." She testified defendant would orally copulate her (while fingering her) almost every time he raped her.

Defendant's point is that because Brittney described defendant's pattern as including multiple preparatory acts prior to intercourse, followed by intercourse while concurrently performing other acts, there is no substantial evidence to support 13 "separate occasions" of forcible lewd acts as the term "separate occasions" is defined by section 667.6, subdivision (d). Specifically, because she did not describe any temporal break(s) between acts, defendant did not have "a reasonable opportunity to reflect." Instead, the gist of her testimony was that he touched her in multiple ways (on different parts of her body) at essentially the same moment, regarding the specific counts challenged on appeal.[7]

At sentencing the defense asked for the low term on all counts, but did not object to full-term consecutive sentencing. The trial court imposed the upper term (eight years) on count 1 and on all other counts, to be run fully consecutively, for a total of 160 years. The court cited one aggravating reason, that each count was more severe than other offenses typically committed under the same statutes. But the court stated no reasons for imposing consecutive sentences, far less for imposing full-term consecutive sentences.[8]

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[7] There were facts showing separate occasions as to the unchallenged counts, as we have described *ante*. The Attorney General describes these facts, but that does not answer defendant's point.

[8] The probation report does not shed any light on this issue; it took its facts from the People's trial brief, which had alleged much of the conduct was simultaneous. The report did not explain how all the offenses in Brittney's room were separate from each other, but simply asserted they were on separate occasions. Evidently for this reason the probation report stated the "criteria affecting consecutive sentencing" were "Not applicable." The probation report also stated that most of the charges (counts two through sixteen and nineteen) involved substantial sexual conduct within the meaning of section 1203.066, subd. (b), but no such allegation appears in the amended information. The prosecutor brought this last mistake to the trial court's attention at the sentencing hearing.

The parties discuss various cases but agree on the applicable test for "separate occasions." The key question in determining whether any two defined sexual counts should be run fully consecutively to each other is whether "the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior." (§ 667.6, subd. (d).) That question is for the trial court to resolve in the first instance, subject to review for substantial evidence. (See *People v. Pena* (1992) 7 Cal.App.4th 1294, 1314-1315; *People v. Corona* (1988) 206 Cal.App.3d 13, 18, fn. 2 ["once the issue has been resolved by the trial court we are not at liberty to overturn the result unless no reasonable trier of fact could decide that there was a reasonable opportunity for reflection"].)

It does not take much to make two sexual offenses "separate" for full consecutive sentencing purposes. In a prior case we rejected a vagueness challenge to the statute, after reviewing a number of cases applying it. We ultimately held as follows:

> "It takes no particular depth of reasoning to be able to distinguish between a situation where a perpetrator engages in a continuous course of conduct involving multiple sex offenses with no break in between and one in which the individual offenses are separated by some other activity, either of the defendant or another, that interrupts the assault and affords the perpetrator an opportunity to reflect on what he or she is doing. The activity need not involve any type of movement of the victim and need not be of any particular duration. It may be nothing more than car lights going by that cause the perpetrator to pause and reflect before proceeding, as in [*People v. King* (2010) 183 Cal.App.4th 1281, 1325], or some activity not amounting to a sex offense, like pausing to listen to the victim's answering machine or punching the wall, as in [*People v. Plaza* (1995) 41 Cal.App.4th 377, 384]." (*People v. Solis* (2012) 206 Cal.App.4th 1210, 1220.)

Here, as to the counts challenged by defendant on appeal, the evidence does not show more than five separate occasions in her room. Although Brittney testified intercourse occurred more than five times in her room, she explained that on each such occasion defendant would combine various sexual acts, as we have described. The prosecutor never asked about any facts that might have shown any separation among

these various acts on any given occasion in her room. Nor did the prosecutor make any relevant elections during closing argument, to try to tie down different acts in Brittney's bedroom to different occasions. Instead, the evidence as it related to the amended information shows five occasions when defendant committed multiple simultaneous or nearly simultaneous sexual acts on Brittney with no evidence of any appreciable change in activity.

This is simply not a case where the trial court could have found "that every act or offense [in Brittney's bedroom] was committed on a separate occasion." (*People v. Irvin* (1996) 43 Cal.App.4th 1063 1071.) Accordingly, we must remand for a new sentencing hearing where the parties and trial court can address consecutive sentencing. "Upon remand, if the court decides to resentence defendant under subdivision (d), it must give a factual explanation supporting its finding of 'separate occasions' for each count sentenced under that subdivision. An overall statement of the court's general impression of the evidence is insufficient. [¶] If the court decides to sentence pursuant to section 667.6, subdivision (c), and impose full, separate and consecutive terms for the sex offense counts that it determines did not occur on a separate occasion, it must also provide a statement of reasons for this sentencing choice." (*Id*. at p. 1072.)

DISPOSITION

The convictions are affirmed but the sentence is vacated and the cause remanded to the trial court for a new sentencing hearing consistent with this opinion.

/s/
Duarte, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Hull, J.